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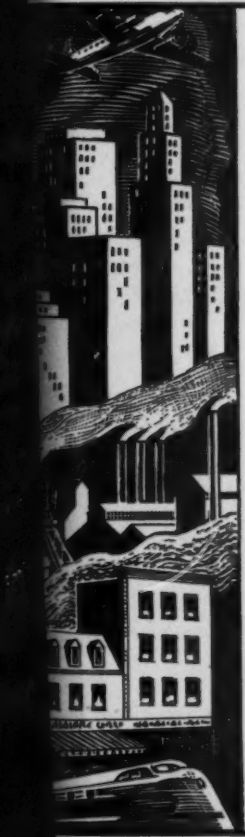

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DECEMBER 1959—JANUARY 1960

Contents

Recent Decisions

WHAT*

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Federal Interstate Income Law

ALMOST before the ink had dried on the new Federal law setting some limits upon State taxation of income from interstate commerce, Louisiana announced that it would challenge its constitutionality. Other states, no less jealous of their taxing powers, may attempt to test the constitutionality of the law in the courts.

The provisions which have raised the controversy are contained in Senate 2524[1], signed by the President on September 14, 1959. They provide that no state or political subdivision thereof may impose, "for any taxable year ending after the date of the enactment of this Act,[2] a net income tax on the income derived within such State by any person[3] from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

"(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

"(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)."

It is specifically provided that the Act shall not apply to the imposition of a net income tax on a corporation organized under the laws of the taxing state, or on an individual who, under the laws of the state, is domiciled in, or a resident of, such state. In addition, "a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property." The term "independent contractor" is defined as a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities.

Under the second section of the Act, "No State, or political subdivision thereof, shall have power to assess, after the date of the enactment of this Act, any net income tax which was imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by" this Act.

The initiative for this legislation came from the business community. Since February 24, 1959, when the Supreme Court handed down its historic *Northwestern*

[1] Public Law 86-272.
[2] September 14, 1959.
[3] The United States Code, Title 1, Section 1, provides that the word "person" includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

decision,[4] enormous pressure had been brought upon Congress to promulgate rules with respect to state taxation of interstate commerce. In that decision, the court held that a state may levy a properly apportioned net income tax upon a foreign corporation engaged exclusively in interstate commerce, if the tax is not discriminatory, and if the local activities of the corporation constitute a sufficient nexus to justify its imposition. That decision was followed shortly by the court's refusal to pass upon a case[5] in which the Louisiana Supreme Court had sustained a tax upon a corporation whose only activity in Louisiana was the solicitation of orders by out-of-state salesman. The Court had opened the door to greatly increased taxation of interstate commerce, and the business community looked to Congress to place some sort of limitation on the power of the states in this field.

The result is Senate 2524, narrow in scope, exempting from state income taxes only corporations which do little or nothing within a state except solicit orders, approved or rejected outside the taxing state and filled, upon approval, by shipment or delivery from a point outside that state.

The Act does not pretend to solve all the problems implicit in the Supreme Court's decisions, e.g., the need for a uniform formula of apportionment so as to avoid the taxation of more than 100% of a corporation's income. Aware of the limited application of S. 2524, Congress has provided for "full and complete studies of all matters pertaining to the taxation by the States of income derived within the States from the conduct of business activities which are exclusively in furtherance of interstate commerce or which are a part of interstate commerce, for the purpose of recommending to the Congress proposed legislation providing uniform standards to be observed by the States in imposing income taxes on income so derived." The results of these studies are to be reported to the Congress by its designated Committees on or before July 1, 1962.

As pointed out above, the reaction to S. 2524 has not been uniformly favorable. The Louisiana Collector of Revenue described the Act as hastily drafted, and announced that as soon as the proper case comes along, Louisiana will challenge its constitutionality.[6] A Texas Congressman takes the view that, since S. 2524 concerns raising revenue, it should have originated in the House of Representatives. It has been alleged that the Act hurts local merchants, since its protection doesn't extend to domestic corporations. The Executive Secretary of the National Association of Tax Administrators expressed a fear that the courts will interpret the statutory language to include the maintenance of an office for processing sales orders as part of the protected area, treating the maintenance of such an office as merely part of the solicitation of orders and therefore protected from state taxes under the Act.

The Louisiana Collector of Revenue raises two constitutional objections. He contends that Congress does not have the power, under the Commerce Clause, to limit the states' power to tax income derived from interstate commerce. His second constitutional objection goes to the provision in S. 2524 prohibiting the assessment, after the effective date of the Act, by a state, or political subdivision thereof, of "any net income tax which was imposed by such State or political subdivision, as the case may be, for any tax-

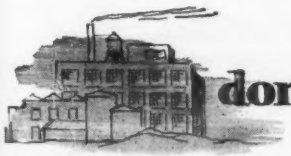
[4] *Northwestern States Portland Cement Co. v. Minnesota*, 350 U. S. 534, 79 S. Ct. 383.
[5] *Brown-Forman Distillers Corp. v. Collector of Revenue*, 101 So. 2d 70, certiorari denied by the U. S. Supreme Court, 79 S. Ct. 602.
[6] Address before the Tax Executives Institute meeting at French Lick, Indiana.

able year ending on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by" this Act. The Collector contends that this constitutes an illegal prohibition of retroactive assessments against companies whose activities were limited to the solicitation of orders before the law became effective, even though other similarly situated corporations may have paid such taxes.

Whether or not Senate 2524 is eventually held unconstitutional by the courts, it is presently in force. By its terms, it effectively prevents any state or political subdivision thereof from imposing a net income tax on corporations merely soliciting orders within the taxing jurisdiction and filling them in interstate commerce. Twenty-two states[7] have indicated an intention to tax the income of corporations operating exclusively in interstate commerce. Not all of these attempt to tax corporations which merely solicit interstate orders within their borders. The Pennsylvania Department of Revenue has already stated[8] that the Act will have no effect on the administration of its corporate net income taxes since Pennsylvania does not attempt to tax corporations "engaged in mere solicitation activities within the commonwealth." To the extent that these states may attempt to tax such corporations, and only to that extent, their taxing power is curtailed by the Act.

It is interesting to note that, by the addition of the phrase "or political subdivision thereof," Congress has made the Act as effective a protection from city income taxes as from state income taxes.

Perhaps the impact of Senate 2524 can best be summed up in the words of Congressman Celler of New York: "The question of interstate taxation is so complex and so replete with difficulties and mysteries, if I may use that term, that it would be well only to set up a minimal standard. That is all this bill does."



domestic corporations

DELAWARE

Chancery Court refused to approve a settlement which would have included a new incentive compensation plan that was a radical departure from the disputed compensation plan.

Plaintiff stockholders brought an action charging the individual defendants with breaches of fiduciary duty as directors and officers of the corporate defendant, in allegedly causing excessive compensation to be paid to themselves and other employees of the corporation. Subsequently, plaintiffs made an application requesting

[7] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, North Carolina, Oregon, Pennsylvania, Tennessee, Utah, Virginia, Wisconsin.

[8] Letter, Department of Revenue, September 23, 1959.

the court to approve a settlement of the suit which included an entirely new and radically different plan for incentive compensation.

The Chancery Court for New Castle County took the position that "a proferred settlement should not be permitted to serve as a device for obtaining summary court sanction of a new and controversial substitute incentive plan which purports to do much more than merely reduce the size of the present compensation fund." The proposed settlement was disapproved.

Nadler et al. v. Bethlehem Steel Corporation et al., 154 A. 2d 146 William E. Taylor, Jr., of Wilmington, and Nathan B. Kogan, of New York City, for plaintiffs. Robert H. Richards, Jr., of Richards, Layton & Finger, of Wilmington, and Albert R. Connelly, of Cravath, Swaine and Moore, of New York City, for defendants. Joseph T. Walsh of Logan, Marvel, Boggs & Theisen, of Wilmington, and Mortimer A. Shapiro, of New York City, for objectants, Henry Schwartz and Dorothy Schwartz. Abraham Hoffman, of Wilmington, and Abraham I. Markowitz, of New York City, for objectant, Jerome G. Rose. Irving Morris, of Cohen & Morris, of Wilmington, and Martin Horowitz, of New York City, for objectants, Shirley Krieger and Benjamin Richland. Irwin M. Taylor of Kaufman, Taylor & Kimmel, of New York City, for the objectant, Irving Miller.

Proxies held not invalid because rubber-stamped with owner's signature, voted by pledgees rather than pledgors, or because the entire series voted by a single broker was counted rather than only the last proxy.

Plaintiff stockholders brought an action against defendant Delaware corporation to procure a judgment that defendant's merger and consolidation with another corporation was null and void, and both parties moved for summary judgment. Plaintiffs attacked the merger principally on the ground that it was not approved by two-thirds of defendant corporation's outstanding common stock, presenting three grounds to support their allegation.

First, the plaintiffs alleged that a number of the proxies voted in favor of the merger were not signed by the registered owner but rather were rubber-stamped with the registered owner's signature. The Chancery Court for New Castle County took the view that the use of a stamped facsimile signature was sufficient to cloak such signatures with the presumption of authenticity. "Considering the practicalities of corporate life, at least in the field of proxy voting, and realizing that the rubber-stamped signature gives rise only to a presumption of authority, I conclude that the proxies here involved were signed and therefor properly counted by the inspectors."

Plaintiffs then contended that certain proxies were counted which should have been considered revoked by later proxies. Plaintiffs' contention was based on the theory that a later proxy revokes an earlier proxy although such instructions are not given in the proxy and although the number of shares covered by the various proxies does not exceed the total number of shares registered in the proxy-giver's name. The Chancery Court noted

that the proxies were not, in toto, in excess of the total registered in the particular stockholder's name and that no instructions were contained in the proxies revoking prior proxies, and concluded that, therefore, the counting of all of such shares was not inconsistent.

Plaintiffs' third contention was that 8 Delaware Code § 217 precluded brokers from voting shares held in margin accounts and registered in their names, on the theory that the relationship between customer and broker in a margin account situation was that of pledgor-pledgee, and that under § 217 the pledgee could not vote the shares unless expressly so authorized on the corporate books. They were not so authorized in the instant case. The shares involved were registered in the broker's name without qualification, and the Court concluded that the votes cast by the brokers on these shares were not rendered invalid by Section 217.

The motions of plaintiffs and defendant for summary judgment were denied, plaintiffs' on the above grounds and defendant's on others.

Schott et al. v. Climax Molybdenum Company, 154 A. 2d 221. S. Samuel Arsht of Morris, Nichols, Arsht and Trunnell, of Wilmington, and Charles H. Lieb, Morris Katz and Daniel Rosenbloom of Paskus, Gordon and Hyman, of New York City, for plaintiffs. Robert H. Richards, Jr., of Richards, Layton and Finger, of Wilmington, and Arthur H. Dean, Robert A. McDowell, William E. Willis and Edward C. Stebbins, Jr., of Sullivan and Cromwell, of New York City, for defendant.

NEW YORK

Stockholder held not entitled to appraisal and payment of his stock where he had agreed to sale of corporate assets pursuant to plan of dissolution, and later objected to sale because such plan was not carried out.

This was a proceeding by a stockholder for appraisal and payment of his stock. The primary business of the corporation was the buying, selling, exchanging and leasing of real property, although the management and operation of a multiple dwelling constituted its sole business activity, the sale of which occasioned this action. Since no meeting of stockholders was held pursuant to Section 45 of the Stock Corporation Law, the issue was presented as to whether such sale was made outside the regular course of the corporation's business so as to give rise to a right of appraisal. From a decision by the Appellate Division dismissing the petition for appraisal and payment (*In re Roehner*, 180 N. Y. S. 2d 586, The Corporation Journal, June—July 1959, page 225-7), the stockholder appealed.

The Court of Appeals of New York observed that ordinarily the sale by a real estate corporation of its sole asset is not outside the regular course of business so as to require stockholder consent. Where, however, the sale is pursuant to a prior plan of corporate dissolution this principle does not apply, and stockholder consent is required. In the instant case, however, the stockholder had agreed to a sale of the real estate pursuant to a plan of dissolution, and later objected to the particular sale because such plan was not carried out. The court pointed out that the statute for the protection of minority stockholders was a recognition of the in-

justice of requiring them to abandon, change or limit their business, whereas here the petitioning stockholder was not "required" to do anything but, on the contrary, had concededly agreed to a sale of the real estate pursuant to a plan of dissolution. The court concluded that Section 20, giving the right of appraisal, "was clearly not intended to benefit a person in such a situation." The order of the Appellate Division dismissing the petition was affirmed.

Roehner v. Gracie Manor, Inc., 160 N. E. 2d 519. Daniel Jacobs and Samuel Hoffman, of New York City, for appellant. Jacob Mishler, of Long Island City, for respondent.

foreign corporations

CALIFORNIA

Foreign corporation ruled not doing business in California so as to be subject to service of process where it conducted its business in the State through a nonexclusive manufacturer's representative.

This was an action for personal injuries sustained by plaintiff when the cylinder of a revolver manufactured by defendant Massachusetts corporation exploded. Service was attempted to be made on defendant by serving its alleged agent, sales manager and manufacturer's representative in California. Defendant's motion to quash service was heard on affidavits and granted by the trial court. It appeared from defendant's affidavit that defendant was a Massachusetts corporation with its offices and manufacturing facilities in Springfield, Massachusetts; it was not qualified in California; it had no agents, salesmen or other employees residing in California; it had no offices, property or assets in California; it distributed its products f.o.b. Springfield through regular dealer channels; and the alleged agent, sales manager and manufacturer's agent was, in fact, a nonexclusive manufacturer's representative and not an agent or sales manager.

The District Court of Appeal, Fourth District, took the position that since there was a conflict in the affidavits on a question of fact, those in favor of the prevailing party (the defendant) must be taken as true on appeal, and the facts stated therein considered established. "Accepting the foregoing facts stated in said affidavit as true, and the facts which reasonably may be inferred therefrom, we can not say as a matter of law that Smith & Wesson, Inc. was 'doing business' in California. . . ." The order granting the motion to quash the service was affirmed.

Cosper v. Smith & Wesson Arms Co., 338 P. 2d 596. Morris B. Chain and Milton M. Younger of Bakersfield, for appellant. Borton, Petrini, Conron & Brown of Bakersfield, for respondent.

MASSACHUSETTS

Unlicensed foreign corporation not deprived of right of resort to state courts where its activities were exclusively interstate.

This was an action by an arms manufacturer to enjoin the defendant retail dealer from selling plaintiff's trade marked rifles and ammunition at prices lower than the fair trade price. Plaintiff was a Delaware corporation with its home office and principal place of business in Bridgeport, Connecticut. It manufactured its ammunition in Bridgeport and its rifles in New York and Ohio. Defendant was a Massachusetts corporation and the largest discount house in New England. Defendant's violation of the fair trade law was conceded, and its sole contention was that plaintiff foreign corporation's failure to qualify in Massachusetts deprived it of the right of resort to the Massachusetts courts under Section 5, Chapter 181, General Laws of Massachusetts.

The Supreme Judicial Court took the view that the principal issue was whether the plaintiff was engaged exclusively in interstate commerce. The court observed that most of the plaintiff's activities in Massachusetts have been held by the courts not to amount to more than interstate commerce, specifically mentioning keeping an office, having a local bank account, employment of a stenographer and of salesmen, the presence of samples, the part-time presence of plaintiff's New England district manager and two field men, professional shoppers, and resort to the courts. A decree enjoining the defendant in accordance with plaintiff's bill was ordered.

Remington Arms Co. v. Lechmere Tire & Sales Co., 158 N. E. 2d 134. A. Lane McGovern of Boston (Parker D. Thomson, Cambridge, with him), for plaintiff. George S. Abrams of Boston (Ruth I. Abrams and George S. Abrams of Boston, with him), for defendant.

Foreign corporation was held not to be doing business in Massachusetts so as to be subject to service of process where its only activity in the state consisted of sales to an independent contractor and promotional activities.

Plaintiff Massachusetts corporation brought this action against defendant California corporation for infringement of trademark. Defendant moved to quash the service on the ground that it was not doing business in Massachusetts so as to be subject to service of process. Defendant had entered an exclusive distributorship arrangement with an established company in Massachusetts which sold and distributed its own products as well as defendant's. The distributor did not act as the broker for defendant's product but purchased it outright. Defendant supplied promotional material, including samples, and made the distributor certain promotional allowances. On one occasion defendant paid for advertising in Massachusetts and on another occasion sent a representative to Boston in connection with promotion. Defendant carried product liability insurance for the protection of the distributor, and on two occasions referred complaints from Massachusetts consumers to the distributor.

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. . . . Are a client's activities of such a nature as to require its qualification as a foreign corporation in one or more states?

. . . . The forms and supplementary documents to be filed? . . . Special certifications? . . . State and county agencies with which papers must be filed? . . . Fees? . . . Taxes? . . . Possible recordings? . . . Possible publication?

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The United States District Court, D. Mass., took the view that since defendant neither exercised, nor had the right to exercise, control over the distributor, the latter was an independent contractor and not an agent of defendant. Therefore, the question became whether defendant's own activities in Massachusetts were sufficient to subject it to process. These activities, the court concluded, were merely promotional, and were insufficient to subject the defendant to process. The motion to quash was allowed and the action dismissed.

Venus Wheat Wafers, Inc. v. Venus Foods, Inc., 174 F. Supp. 633. W. R. Hulbert, Wm. W. Rymer, Jr., Fish, Richardson & Neave, of Boston, for plaintiff. Cedric W. Porter, Porter, Chittick & Russell, of Boston, for defendant.

NEW JERSEY

Iowa corporation held not doing business in New Jersey so as to be subject to service of process where the relationship of its New Jersey sales representative to the Iowa corporation was that of an independent contractor.

Plaintiff New York corporation brought this action against an Iowa corporation and a New Jersey corporation in the United States District Court for the District of New Jersey, invoking the diversity jurisdiction of that court. Service of process was effected on the alleged "agent and sales representative" of the Iowa corporation. Defendant Iowa corporation moved for dismissal for lack of personal jurisdiction.

The New Jersey corporation was the sales representative of defendant Iowa corporation in New Jersey. Defendant furnished an illustrated catalogue to its sales representative for use in securing orders. The representative filled the orders which it took from New Jersey customers by purchasing the merchandise from defendant at a discount price, and reselling it at a higher price to the consumer. In some instances, shipment was made to the sales representative; in others, shipment was made by defendant directly to the customers. Defendant owned no property, maintained no office and had no employees in New Jersey. It was not listed in any New Jersey telephone directory, and its name did not appear on the representative's door, nor did it contribute to the representative's office expenses. The sales representative's president was not authorized to represent defendant as a managing or general agent or as an agent for service of process. The sales representative acted for other manufacturer's besides defendant.

The court found that defendant was not present in New Jersey so as to support service of process, observing that the relationship of the sales representative to defendant was that of an independent contractor. The motion to dismiss was granted.

Air Devices, Inc. v. Titus Manufacturing Corp. and C. R. Hutcheon, Inc., 167 F. Supp. 1. Harry Sommers of Newark, N. J., by Harry Price of New York City, of counsel, for plaintiff. Harry B. Rook of Newark, N. J., and Marzall, Johnson, Cook & Root, by Lloyd C. Root, of Chicago, for defendants. (*Affirmed by the U. S. Court of Appeals for the Third Circuit, August 11, 1959.*)

NEW YORK

Foreign corporation held amenable to service in New York where its activities through its "export representative" in New York were regular, continuous and substantial.

Service of process on defendant Iowa corporation was attempted by serving an officer of defendant's corporate "export representative" in New York. For about five years, during which period the summons and complaint were served, defendant and its representative were under contract whereby the representative was to solicit the sale of defendant's products throughout the world, with the exception of the United States, Canada, Alaska and Hawaii. All sales were subject to approval by defendant, and the representative's remuneration was on a commission basis. There was no intercorporate relationship between defendant and its representative in the nature of stock ownership or common officers or directors. In the majority of cases, the sales contract was made between defendant and the customer directly, and the customer was billed direct. The representative placed a telephone listing in the name of the defendant in the New York telephone directories and was supplied by defendant with its letterheads upon which the address of the representative's office was listed as the "Export Office." The representative had a similar relationship with approximately sixty American manufacturers. The volume of sales generated by the representative for defendant was about $300,000 per year. It was conceded that the representative was amenable to service in New York, and that the service on its officer effectuated service on the representative.

The United States District Court, S. D. New York, held defendant amenable to service of process in New York, pointing out that its activities through its representative were "systematic and regular" covering a period of five years. In addition these activities were substantial, averaging sales of $300,000 per year. "If some lingering doubts were to remain as to whether the due process requirements laid down in the case of International Shoe Co. v. State of Washington have been complied with, it need only be noted that the plaintiff is a New York corporation and that the activities sued upon arose out of activities actually connected with New York, namely, a distributorship agreement between plaintiff and defendant which, to a great extent, covered areas of New York State". The motion to dismiss for lack of jurisdiction was denied.

Nash-Ringel, Inc. v. Amana Refrigeration, Inc., 172 F. Supp. 524. Nathan Shapiro (Berthold H. Hoeniger, of counsel), for plaintiff. Leinwand, Grossman, Mandellbaum & Maron (Irving M. Maron, of counsel), for defendant.

taxation

FLORIDA

Foreign corporation engaged exclusively in interstate commerce which solicited orders in Florida, for retail sale of personal property, through independent commission merchants, held required to register as a dealer, and collect and remit the use tax.

Plaintiff here was a Georgia corporation, not licensed to do business in Florida. Through a wholly owned and controlled division in Atlanta, it sold writing instruments bearing advertising lettering directly to Florida consumers, who distributed them free of charge as a means of advertising their respective businesses. Plaintiff employed no salesmen in Forida in connection with these transactions, but the solicitation of orders was handled by ten independent Florida brokers and commission merchants who sold the products of other manufacturers as well as those of plaintiff. These orders were accepted or refused by plaintiff in Atlanta and, if accepted, payment was made by the Florida customer directly to the plaintiff in Atlanta. The independent brokers were paid an agreed commission. This division of plaintiff maintained no salesroom or other business establishment in Florida, and had no bank account, stock of merchandise or other property in the State except the accounts owed to it by its Florida customers.

The major issue before the Florida Supreme Court was the liability of the plaintiff to register as an out-of-state dealer under the Florida use tax law, and to collect and remit such tax on the writing instruments sold to Florida customers through interstate commerce as described above. Concluding that plaintiff was a dealer within the contemplation of the use tax law, the Court turned to plaintiff's contention, among others, that the statute so construed contravenes the commerce clause and the Fourteenth Amendment to the United States Constitution.

The Court took the position that the representation of plaintiff by ten or more Florida wholesale commission jobbers in the solicitation of Florida customers produced a sufficient jurisdictional contact between plaintiff and Florida to justify the exercise of the taxing power by the State. "We have the view that even though a dealer is not represented in the taxing state to the extent that service of judicial process on his representative would necessarily bind him to respond in a matter in litigation; nonetheless, he can still be represented by solicitors and limited agents who contact Florida residents to the extent that jurisdictional contacts would thereby be established sufficient to support the enforced collection of the Florida use tax." The court held that plaintiff was a dealer required to register under the use tax law, and collect and remit the use tax on the above transactions.

Scripto, Inc. v. Carson et al.,* 105 So. 2d 775. (*Appeal filed in the United States Supreme Court, May 27, 1959; Docket No. 80. Jurisdiction noted October 12, 1959.*)

* The full text of this opinion is printed in the **State Tax Reporter, Florida, page 10,135.**

GEORGIA

Gross receipts from business done in Georgia, for the purpose of allocation and apportionment of income, held not to include receipts from products shipped to customers outside Georgia.

This was an action for refund of Georgia income taxes alleged to have been collected illegally. Plaintiff, a Delaware corporation with its principal office and plant in Georgia, manufactured flavor concentrates used by bottlers of soft drinks. Plaintiff's only customers were such bottlers located in forty-eight states and various foreign countries. Since plaintiff derived its income from the manufacture and sale of tangible personal property it was entitled, under Georgia Code Section 92-3113(4), to use the three factor formula prescribed by that Section in the allocation and apportionment of its income. The only question in the case was with respect to the gross receipts ratio, i.e., whether gross receipts from business done in Georgia included gross receipts from shipments made from plaintiff's Georgia plant to bottlers in other states and foreign countries. A judgment for the taxpayer was affirmed by the court of appeals, and the Revenue Commissioner brought error.

The Supreme Court of Georgia quoted Section 92-3113(4)(c) which reads, "For the purposes of this section receipts shall be deemed to have been derived from business done within this State only if received from products shipped to customers in this State, or delivered within this State to customers . . . " The court, rejecting the Revenue Commissioner's contentions, concluded that this language "simply means that receipts from products shipped to customers outside of this State or delivered to customers outside of this State shall not be included as being Georgia receipts." Judgment for the taxpayer was affirmed.

Oxford v. Nehi Corporation,* 109 S. E. 2d 329. Eugene Cook, Atty. Gen., Ben F. Johnson, Jr., Robert H. Walling, John M. Bowling, Deputy Asst. Attys. Gen., for plaintiff in error. J. Robert Elliott, W. Willis Battle, of Columbus, for defendant in error. John Izard, Jr., Furman Smith, of Atlanta, for parties at interest, not parties to record.

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* The full text of this opinion is printed in the **State Tax Reporter,** Georgia, page 10,220.

MICHIGAN

Imposition of 1 per cent use tax on purchase price of property acquired in transactions subject to 3 per cent sales tax, held unconstitutional.

In the words of the Michigan Supreme Court, "the principal question in this case is the meaning of the constitutional provision that 'at no time shall the legislature levy a sales tax of more than 3%.'" Michigan House Bill 647 of 1959 had increased the use tax from 3% to 4%, providing that the use tax should be only 1% of the purchase price of property acquired in a transaction subject to the 3% sales tax. The prior exemption of sales from the use tax was withdrawn. The language purported to levy the increase upon the user of personal property in Michigan, and to require the user to make a monthly report on all purchases and accompany this report with his tax payment.

The Michigan Supreme Court pointed out that every such requirement applicable to the user was effectively eliminated by other provisions. The result was "to convert the tax from one purportedly levied upon the user for his use of personal property, and to be reported and paid by him, into a tax to be collected by the seller at the point of sale and for the collection and reporting of which he, and he alone, is responsible." "Stripped of legalisms and the technical jargon of the tax experts, this is what finally emerges as a result of the legislative act: two taxes, one of 3 cents, and another of 1 cent, are now levied on each dollar of purchase. Both taxes are measured in the same manner, namely, the price paid for the article. Both are paid at the same time, the time of the sale. Both are imposed because tangible personal property is intended for consumption or use. Both apply to transactions wholly within the borders of this State. Both are paid, as a matter of economic fact, and are intended to be paid, by the same person, the consumer." Concluding that the tax clearly and palpably violated the constitutional prohibition against increasing the sales tax, the court ordered the defendants to desist and refrain from levying, assessing or collecting the additional 1% tax imposed by the Act in addition to the sales tax of 3%.

Lockwood et al. v. Nims et al.,* Michigan Supreme Court, October 22, 1959. Charles C. Lockwood and Charles P. Lockwood, of Detroit, for plaintiff. Paul L. Adams, Attorney General, Joseph B. Bilitzke, Deputy Attorney General, Samuel J. Torina, Solicitor General, Leon S. Cohan, Assistant Attorney General, of Lansing, for intervenor. Stanton S. Faville, Chief Assistant Attorney General, and T. Carl Holbrook and William D. Dexter, Assistant Attorney Generals, of Lansing, for defendant.

* The full text of this opinion is printed in the **State Tax Reporter**, Michigan, page 10,127.

Extending Corporate Activities into New States

Counsel for corporations planning, near the close of the year, to extend their activities into new states in which qualification is contemplated, usually give careful consideration to the dates on which qualification is to be effected. It has been found, in many instances, that if qualification and the carrying on of intrastate activities are deferred until after January 1, there may be savings of taxes which would otherwise be due early in the new year. Also, the preparation and filing of certain tax returns, due early in the new year if qualification and business activities occur prior to January 1, may be postponed for approximately a year if these steps are delayed until after the new year begins.

state legislation

Indiana — Senate Bill 159, Laws of 1959, permits a corporation to omit the statement of relative rights, interests, preferences and restrictions from its share certificates if it states on the face or back of the certificates that such statement, in full, will be furnished by the corporation to any shareholder upon written request and without charge.

Senate Bill 269 permits facsimile signatures of corporate officers on bonds, notes, debentures or other evidences of indebtedness.

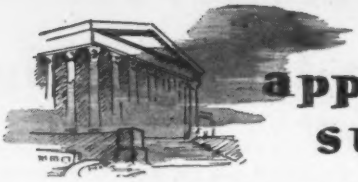
Senate Bill 58, Laws of 1959, approved March 5, 1959, provides for the indemnification of officers and directors of Indiana corporations. Formerly, corporations were not granted the power to indemnify their directors and officers.

Michigan — The imposition of a 1% use tax on the purchase price of property acquired in transactions subject to the sales tax, has been declared unconstitutional by the Michigan Supreme Court. The increase had been brought about by House Bill 647 of 1959, effective September 1, 1959. The Supreme Court decision does not affect the 4% tax on motels and hotels or the tax on federal contracts, and the 4% use tax on purchases made outside the State of Michigan by Michigan residents remains in effect. A digest of the majority opinion in *Lockwood et al. v. Nims et al.* appears on page 295 of this issue.

Nebraska — Legislative Bill 292 of 1959 provides that no corporation will be eligible to enter into a contract which is required to be let by advertising for sealed bids to supply labor, services, materials, or commodities to the State of Nebraska or any of its political subdivisions unless the corporation has qualified in Nebraska.

Oklahoma — General withholding of state income tax by employers, which was to have begun October 2, 1959, has been suspended. Senate Bill 153 of 1959, which would have required the deduction and withholding of income taxes on all wages paid to employees, has been rendered inoperative by the filing of a referendum petition with the Secretary of State. The bill will remain inoperative until a state wide vote on the question of its adoption.

Pennsylvania — House Bill 1332 of 1959 provides for the merger or consolidation of wholly owned subsidiary and parent corporations. Both the parent and subsidiary may be either domestic or foreign corporations. The merger or consolidation may be accomplished by resolution of the directors without a vote of the shareholders. However, shareholders' approval will be necessary "if the state of incorporation of the parent corporation is altered by such plan," or if the stock preferences are altered.



appealed to the supreme court

*The following cases previously digested in The Corporation Journal have been appealed to The Supreme Court of the United States.**

DISTRICT OF COLUMBIA. Docket No. 332. *Murphy v. Washington American League Baseball Club, Inc. et al.*, 267 F. 2d 655. (The Corporation Journal, August—September, 1959, page 248.) Place of business—transfer elsewhere. **Petition for writ of certiorari filed August 21, 1959. Certiorari denied October 12, 1959.**

FLORIDA. Docket No. 80. *Scripto, Incorporated v. Carson*, 105 So. 2d 755. (The Corporation Journal, December 1959—January 1960, page 294. Interstate commerce—collection of use tax. **Appeal filed May 27, 1959. Jurisdiction noted, October 12, 1959.**

MISSISSIPPI. Docket No. 265. *Monaghan v. Seismograph Service Corporation*, 108 So. 2d 721. (The Corporation Journal, August—September, 1959, page 256.) Tax on unapportioned income—failure to separate charges. **Appeal filed, July 31, 1959. October 26, 1959:** *"Per curiam:* The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied."

NEW YORK. Docket No. 272. *Berkshire Fine Spinning Assoc. v. City of New York*, 157 N. E. 2d 614. (The Corporation Journal, October—November, 1959, page 275.) New York City Gross Receipts Tax—"local incident." **Appeal filed August 4, 1959. October 12, 1959:** *"Per curiam:* The appeal is dismissed for want of a substantial federal question."

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* Data compiled from **CCH U. S. Supreme Court Bulletin.**

Discussions on Corporation Law

A Symposium On Small Business, 24 Law and Contemporary Problems, Winter, 1959, pages 1-240.

Foreign Business Operating In The United States, by Smith Thompson. 1959 University of Illinois Law Forum, Spring, 1959, pages 282-310.

The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit, by Willis R. M. Reese. 58 Columbia Law Review, December 1958, pages 1118-1145.

The Corporate Officer and the Law of Agency, by Frederick G. Kempin, Jr. 44 Virginia Law Review, December, 1958, pages 1273-1289.

The Antitrust Laws in a Changing Economy, by Victor R. Hansen, Assistant Attorney General of the United States. 6 U.C.L.A. Law Review, March 1959, pages 183-204.

regulations and rulings

California — Rules adopted by the Commissioner of Corporations, effective November 9, 1959, set a policy for the issuance and sale of common stock by foreign and domestic corporations. The new rules relate primarily to foreign corporations, since cumulative voting is mandatory for ordinary California business corporations.

Under the new rules, the sale of nonvoting or limited voting common shares by any corporation will ordinarily be viewed with disfavor, as will the sale and issue of common shares without cumulative voting rights by a corporation whose principal business is in California. The absence of cumulative voting rights of common stock, or the presence or staggered terms for directors, which mitigate voting rights, will ordinarily be considered as a negative factor in determining whether or not the proposed issuance and sale is "fair, just and equitable."

The new rules provide that, in any case where the sale of common stock without cumulative voting rights is permitted, the prospectus or a rider permanently attached thereon will ordinarily be required to contain a statement explaining the effects of noncumulative or "straight voting." (California Administrative Code, Title 10, Chapter 3, Subchapter 2, Sec. 367.1 and Sec. 844.)

Florida — If a corporation changes its capital structure from par value stock to no par value stock, the corporation should be charged the filing tax relating to the no par value stock less any amount paid at the time of the original authorization of the par value stock. (Opinion of the Attorney General, State Tax Reporter, Florida, ¶ 200-304.)

New Mexico — A retailer must pay the 2% sales (privilege) tax on sales to a tourist or other person from out of state, since the tax is levied on the retailer for the privilege of doing business within the state. The retailer may either absorb the tax himself, or pass it on to the customer. (Opinion of the Attorney General, State Tax Reporter, New Mexico, ¶ 200-150.)

North Carolina — Personal property of a foreign corporation shipped into and held in North Carolina on January 1 for the purpose of being processed and manufactured is subject to the ad valorem tax in the state. (Opinion of the Attorney General, State Tax Reporter, North Carolina, ¶ 200-554.)

Ohio — Commencing with the 1960 personal property tax return, any corporation desiring to file a consolidated tax return must file notice thereof with the Tax Commissioner in writing on or before April 30, or within the filing time as extended, of the year in which such return is filed. Thereafter, every such corporation must continue to file consolidated returns until the parent corporation notifies the Commissioner in writing on or before April 20 of the year in which such return is filed that it does not intend to file a consolidated return for such year. Any corporation which elects to file a consolidated return and subsequently discontinues the use of such return must comply with the provisions of the first sentence of this paragraph before it may again file a consolidated return. (Department of Taxation Rule 203, State Tax Reporter, Ohio, ¶ 21-025.)

some important matters

For December and January

This Calendar does not purport to be a *complete* calendar of all matters requiring attention by corporations in any given state. It is a condensed calendar of the more important requirements covered by the *State Report and Tax Bulletins* of The Corporation Trust Company. Attorneys interested in being furnished with timely and complete information regarding *all* state requirements in any one or more states, including information regarding forms, practices and rulings, may obtain details from any office of The Corporation Trust Company or C T Corporation System.

Alabama — Annual Application Fee for permit to do business due February 1. Quarterly Withholding Tax due on or before January 31.

Alaska — Annual Corporation Tax due on or before January 1.

Arizona — Quarterly Withholding Tax due on or before January 31.

Colorado — Quarterly Withholding Tax due on or before January 31.

Delaware — Annual Report due on or before first Tuesday in January.—Domestic Corporations.

Withholding at Source Returns due January 31.—Corporations paying compensation to Delaware employees.

District of Columbia — Annual Report published and filed between January 1 and January 20.—Domestic Corporations formed under 1901 Act.

Application for license in connection with District Franchise (Income) Tax due before January 1.

Georgia — Annual License Tax Report due on or before January 1.

Indiana — Information and Withholding Returns due on or before January 31.

Iowa — Quarterly Retail Sales Tax due on or before January 31.

Kentucky — Quarterly Withholding Tax due on or before January 31.

Louisiana — Annual Report due February 1.—Domestic Corporations.

Maryland — Returns of Information at the Source and Quarterly Withholding Tax due on or before January 31.

Missouri — Annual Franchise Tax due on or before December 31. Quarterly Retail Sales Tax due on or before January 15.

New Hampshire — Annual Maintenance Fee due on first business day of January.—Foreign Corporations.

North Dakota — Quarterly Retail Sales Tax due on or before January 31.

Oregon — Quarterly Withholding Tax due on or before January 31.

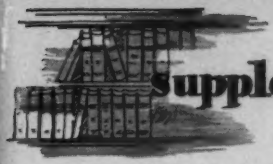
South Carolina — Annual Statement due January 31.—Foreign Corporations.

South Dakota — Quarterly Retail Sales Tax due on or before January 15.

Utah — Quarterly Retail Sales Tax due on or before January 30.

Vermont — Quarterly Withholding Tax due on or before January 31.

West Virginia — Annual Business (Gross Sales) Tax due January 31.



supplementary literature

In connection with its various activities The Corporation Trust Company publishes the following supplemental pamphlets, any of which will be sent without charge to readers of The Journal. Address The Corporation Trust Company, 120 Broadway, New York 5, N. Y.

Heads I Win, Tails You Lose. An explanation of the possible consequences to the corporation which takes a chance [?] on doing business in states outside the state of its incorporation without complying with governing laws, rulings and regulations.

Spot Stocks Mean More Sales. A review of the advantages *and* dangers of using spot stocks at strategic shipping centers to bolster and increase sales.

Corporate Tightrope Walking. Of interest to counsel for and the officers of any corporation carrying on business in interstate commerce.

Agent for Process. Case histories of corporation officials who suddenly found out that trouble can take funny bounces when statutory representation is entrusted to a business employee.

Corporate Confusion. A discussion of the wriggling, twisting, seemingly opposite court decisions which make building a pattern for out-of-state operations by a corporation a risky business these days.

A Pretty Penny . . . Gone! What it can cost a corporation—as shown by actual court cases—if its agent cannot be found when service of process is attempted.

Some Contracts Have False Teeth. Interesting case-histories showing advisability of getting lawyer's advice before contracting for work outside home state, even for federal government.

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Suppose The Corporation's Charter Didn't Fit! Shows how charter provisions which suit well enough at time of organization may be handicaps for the corporation in later life — and some measures to avoid them that a lawyer may help his client to take.

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